In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-735

CHARLES G. NICKELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his grand jury testimony should have been suppressed at trial on the grounds that it was the product of duress and that he was inadequately warned of his rights prior to testifying.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of making a false declaration before the grand jury, in violation of 18 U.S.C. 1623, and was sentenced to a term of 18 months' imprisonment. The court of appeals affirmed, 502 F. 2d 1173 (Pet. App. 1-8). A petition for rehearing was denied on November 1, 1974 (Pet. App. 9). The petition for a writ of certiorari was not filed until December 11, 1974, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The evidence showed that petitioner testified before the grand jury that he had never received any money from any persons during the performance of his duties as a police officer (Pet. App. 34-38). At his subsequent trial, however, two fellow officers, Joseph Dawson and John Cello, testified that between 1965 and 1966 they and petitioner had collected money from individuals engaged in illegal activities.

From April 1965 until approximately April 1966, Dawson, Cello, and petitioner were assigned to Chicago's 18th Police District[1] (Tr. 33-35, 168).[2] Dawson acted as conduit for a portion of "the package," a sum of money paid to vice squad officers monthly for allowing infractions to exist in the District (Tr. 36). Dawson picked up the pay-offs from gambling establishments, while Cello collected money from bars and taverns in the 18th District (Tr. 185). The total monthly collection of about $2,400 was then divided by petitioner, Cello, and Dawson for subsequent distribution among the sixteen members of the Vice Squad in that District (Tr. 185, 190).

Prior to petitioner's grand jury testimony, counsel for the government had explained the purpose of the grand jury to petitioner and warned him of his rights as follows (Pet. App. 25-26):

> Q. Sir, at this time I would like to advise you that this is a federal grand jury investigating

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[1]Petitioner and Dawson were assigned as partners to the Vice Squad, while Cello worked in the "crime car."

[2]"Tr." designate the transcript of the trial in the district court which is lodged with the Clerk of this Court.

possible violations of certain federal criminal laws. Specifically, this Grand Jury is investigating possible violations of Title 18, United States Code, Section 1951, which is the federal extortion statute. Do you understand that?

A. Yes; is that the one they call the Hobbs Act?

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Q. Now, sir, I would like to advise you at this time that under the Fifth Amendment to the United States Constitution you have the right to remain silent. That is to say, you have the right to refuse to answer any question, the answer to which you feel may tend to incriminate you.

Now, if you do answer questions and supply this Grand Jury with information, any testimony and any information you supply to this Grand Jury can be used against you in subsequent criminal proceedings or other proceedings.

Now do you understand your rights in connection with the Fifth Amendment?

A. I do.

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1. Petitioner contends that because his grand jury testimony was given under the duress created by Rule 51 of the Chicago Police Department, which prohibits police officers from failing to give evidence before a grand jury by claiming their privilege against self-incrimination,[3] he should have been allowed to introduce

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[3]Rule 51 states as grounds for administrative proceedings against police officers the following (Pet. App. 12):

Failing to give evidence before the Grand Jury, Coroner's inquest, in court, or before any governmental administrative

at trial evidence about this Rule and other related evidence on the issue of duress. As the court of appeals held, however, duress is a defense only if the defendant reasonably feared immediate death or serious bodily injury that could be avoided only by committing the criminal act charged. Such was not the situation in the instant case (Pet. App. 5-6).[4]

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body, including the Police Board, when properly called upon to do so, or refusing to testify on the grounds that such testimony might incriminate the member, or refusing to sign a waiver of immunity when requested to do so by a superior officer.

At the time of petitioner's grand jury testimony, Rule 51 was still in effect. However, as a result in part of this Court's decision in *Garrity* v. *New Jersey*, 385 U.S. 493, the Seventh Circuit in *Confederation of Police* v. *Conlisk*, 489 F. 2d 891, 895, subsequently held Rule 51 invalid to the extent that it denied police officers the privilege against self-incrimination. That decision in effect invalidated Rule 51 (Pet. App. 3).

[4] Contrary to petitioner's assertion, the courts are not in conflict on this issue. In *United States* v. *Lazaros*, 480 F. 2d 174, 176-177 (C.A. 6), certiorari denied, 415 U.S. 914, on which petitioner relies, the defendant was allowed to present testimony concerning whether or not he had perjured himself before the grand jury under duress. Unlike petitioner here, however, his defense of duress entailed fear of bodily harm. In *United States* v. *Willoz*, 449 F. 2d 1321, 1325 (C.A. 5), on which petitioner also relies, the defendant willfully filed an inaccurate special wagering tax return. The court of appeals remanded the case to determine if the defendant signed the return under duress. It did not, however, suggest any criteria for determining what constitutes duress.

United States v. *Barash*, 365 F.2d 395, 401-402 (C.A. 2), 412 F. 2d 26, 30 (C.A. 2), certiorari denied, 396 U.S. 382, cited by petitioner, is likewise inapposite. There, an accountant made payments to internal revenue agents in connection with their audit of income tax returns of his clients. The agents had previously pleaded guilty to taking the bribes. The defendant contended that he paid the bribes under threat of serious economic loss. In those limited circumstances, the court stated that "if a govern-

2. Petitioner also contends that the government's warning that "any testimony and any information you supply to this Grand Jury can be used against you in subsequent criminal proceedings or other proceedings" (Pet. App. 25-26) did not take account of this Court's prior decision in *Garrity* v. *New Jersey*, 385 U.S. 493, 500, in which it was held that the threat of removal from public office to induce a witness to forego the privilege against self-incrimination renders the resulting statements involuntary and, therefore, inadmissible in the subsequent criminal proceedings. Accordingly, since the police department's Rule 51 threatened removal for failure to testify, petitioner argues that the government's warning "entrapped" him into committing perjury.

The fact that petitioner was in effect "overwarned" did not, however, "entrap" him into committing perjury. The incorrect warning simply stated one horn of a dilemma that Rule 51 would have created if valid. As the court of appeals stated, "[w]hile [the warning] probably made that apparent dilemma more salient to the witness, it does not change the nature of the witness' dilemma" (Pet. App. 4). Petitioner could have avoided the dilemma

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ment officer threatens serious economic loss unless paid for giving a citizen his due, the latter is entitled to have the jury consider this, not as a complete defense like duress but as bearing on the specific intent required for the commission of bribery." Unlike Barash, however, petitioner does not allege that he was threatened by any government official, only that he felt threatened by the existence of Rule 51. Nor does petitioner contest the finding of his intent to make false declarations before the grand jury.

Nor, finally, is *United States* v. *Knox*, 396 U.S. 77, 83, applicable on the question of duress. *Knox* merely left open the question of what elements constitute a viable claim of duress. Moreover, *Knox* involved the making of false statements on a wagering tax form; it did not involve perjury before the grand jury.

by telling the truth and subsequently moving to suppress the testimony under *Garrity, supra.* Or he could have invoked his Fifth Amendment privilege during the proceeding and subsequently challenged on Fifth Amendment grounds any administrative proceeding brought against him pursuant to Rule 51. In any event, petitioner was not free to avoid the apparent dilemma by committing perjury.

Petitioner contends that his claim of entrapment is supported by the fact that he was "treated as a target" of the investigation, he was given no indication of why he was called before the grand jury, and "he was not, unlike other policemen, previously interviewed" (Pet. 7). Petitioner does not argue, however, that at the time he was called before the grand jury he was a "putative defendant" on whom the investigation had already focused,[5] nor could he so contend, since—as he admits—at the time he testified the statute of limitations barred prosecution for the pay-offs, which occurred in 1965 and 1966 (Pet. 7). Moreover, even assuming that he was a "putative defendant," petitioner cites no authority for his implied proposition that a "putative defendant" may not be called before a grand jury, and we know of none. Nor is there any authority for claiming that an agent of the federal government is required to interview a grand jury witness prior to his appearance before the grand jury. Nor, finally, is there any basis for petitioner's contention that he was

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[5]See our Petitions for Writs of Certiorari in *United States* v. *Wong,* No. 74-635, and *United States* v. *Mandujano,* No. 74-754, which involve questions concerning the type of warnings which must be given so-called "putative defendants" before the grand jury. Petitioner in the instant case was, of course, given the full *Miranda* warnings sought by the respondents in those cases.

not told why he was called before the grand jury. Petitioner was warned prior to testifying that "this is a federal grand jury investigating possible violations of certain federal criminal laws. Specifically, this Grand Jury is investigating possible violations of Title 18, United States Code, Section 1951, which is the federal extortion statute. Do you understand that?" (Pet. App. 25). This warning adequately apprised him of the nature of the investigation and of the prosecutor's assumption that petitioner might have information that would be useful to the grand jury.

Nor, in any event, could petitioner be considered "entrapped" into committing perjury, as the concept of entrapment has been articulated by this Court. As the court of appeals stated, "[i]t was defendant's predisposition to lie his way out of his difficulties that led to this crime. The Government did not solicit or encourage perjury; at most it created a situation in which perjury appeared expedient. This is not 'so outrageous' as to bar prosecution. *United States* v. *Russell,* 411 U.S. 423, 431" (Pet. App. 5). See also *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369.

Moreover, even assuming that petitioner was somehow compelled to incriminate himself in violation of his Fifth Amendment privilege, that does not bar a perjury prosecution for false testimony before the grand jury. *United States* v. *Devitt,* 499 F. 2d 135, 141-142 (C.A. 7); *United States ex rel. Annunziato* v. *Deegan,* 440 F. 2d 304, 306 (C.A. 2); *United States* v. *Knox,* 396 U.S. 77. "[T]he immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit perjury." *Glickstein* v. *United States,* 222 U.S. 139, 142. Perjurious testimony directly obstructs the

grand jury's broad investigative authority. "Our legal system provides methods for challenging the Government's right to ask questions [before a grand jury]—lying is not one of them." *Bryson* v. *United States*, 396 U.S. 64, 72.

We believe that the court of appeals was thus clearly correct in holding in the instant case that, even if petitioner was in some sense improperly pressured into testifying before the grand jury (by means not amounting to "duress"), his perjury is not thereby excused, and his false testimony is not subject to suppression in a perjury prosecution. As the court recognized (Pet. App. 5), however, this portion of its holding is seemingly in conflict with holdings of the Fifth Circuit in *United States* v. *Mandujano*, 496 F. 2d 1050, and *United States* v. *Rangel*, 496 F. 2d 1059, which allow a perjurer to obtain suppression of his grand jury testimony in a perjury prosecution because he had been "improperly compelled" to testify by not receiving full *Miranda* warnings. We have petitioned for certiorari in *Mandujano* (No. 74-754) and in the similar case of *United States* v. *Wong*, C.A. 9, No. 74-1636, decided September 23, 1974, No. 74-635, and have indicated in our petitions that those decisions conflict in this respect with a number of cases from several circuits, including the instant case (Mandujano Pet. 18, n. 10; Wong Pet. 11, n.8)[6]

Reading this case, *Mandujano*, and *Wong* at their narrowest, a distinction could be drawn based on the fact that petitioner here was not a putative defendant (a consideration clearly irrelevant to the analysis of the court below; see Pet. App. 4) and that there was here no failure to convey *Miranda* warnings, as in *Mandujano* and in *Wong*

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[6]Copies of our petitions are being sent to petitioner's counsel.

(where the warnings were given but not understood), but a different kind of alleged impropriety. However, we believe that the approach of the Fifth and Ninth Circuits is fundamentally at odds with the Seventh Circuit's firm adherence to the principle that perjury is punishable even when done in response to improperly propounded questions. Accordingly, if this Court elects to review the issues presented in our petitions in *Mandujano* and *Wong*, we do not oppose the grant of the petition with respect to the second question.[7]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[7] *Mandujano* and *Wong* both involve, in addition to the suppression-"entrapment" issue (turning on the proper application of this Court's *Glickstein-Knox-Bryson* line of authority) that is presented here, other questions concerning the nature of the obligations, if any, to provide warnings to grand jury witnesses and the criteria for identifying a "putative defendant." Because of the more comprehensive sweep of the issues presented in those cases, the Court may wish to hold this case pending its disposition of *Mandujano* and *Wong*.